United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL
and proof of service

74-2238

To be argued by
JESSE BERMAN

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P1S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :

Appellee, :

-against- : Docket No. 74-2238

MELVIN KEARNEY, :

Appellant. :

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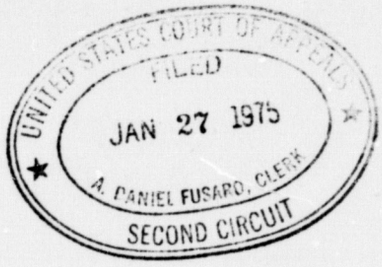
BRIEF FOR APPELLANT

APPEAL FROM A JUDGMENT OF CONVICTION RENDERED IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :

Appellee, :

-against- :

MELVIN KEARNEY, :

Appellant. :

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ISSUES PRESENTED

1. Whether the Court erred (1) in ruling that the six-month speedy trial rule was tolled for the period that appellant was in state custody, and (2) in assuming, without an evidentiary hearing, that there had been state-court proceedings involving appellant during that period, and (3) in ruling that the six-month rule is tolled for proceedings, other than trial, on other charges.

2. Whether the government, having persuaded the Court to reverse the sequence in which the Court had planned to try appellant's two cases, by promising that it would be satisfied with one conviction of 'any sort,' is estopped from maintaining the conviction against appellant on the instant case.

3. Whether since the 'McCartin' prints were taken merely to corroborate what the government had learned from the illegal Brooklyn prints, the 'McCartin' prints were tainted and had no independent source, and all the fingerprint evidence should have been suppressed.

4. Whether the fact that the government was not claiming that the 4 print lifts which were destroyed belonged to appellant did not render these prints or their destruction irrelevant, and whether the Court erred in limiting cross-examination and summation on that issue.

5. Whether the prosecutor, in his summation, in effect commented on appellant's not testifying, gave the impression that he knew facts outside the record, and, in totality,

shifted to appellant part of the government's burden of proof.

6. Whether the Court, in sentencing appellant and in denying him Young Adult Offender status, erroneously relied on the existence of facts of which appellant had been acquitted.

STATEMENT PURSUANT TO RULE 28(a)(3)

A. Preliminary Statement

This appeal is from a judgment of the United States District Court for the Southern District of New York (Motley, J.), rendered September 16,1974, convicting appellant after trial by jury of the crimes of bank robbery [18 U.S.C. §2113(a)] and armed bank robbery [18 U.S.C. §2113(d)], and sentencing him to ten (10) years imprisonment.*

Timely notice of appeal was filed and this Court, on November 19, 1974, appointed Jesse Berman, Esq., as counsel on appeal, pursuant to the Criminal Justice Act.

Appellant is presently serving the sentence pursuant to the judgment herein.

B. Statement of Facts

On March 16, 1972, the Crotona Parkway, Bronx, branch of the Bankers Trust Company was robbed. Although

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*/ Appellant was first tried on the instant indictment on June 17, 18, 19 and 20, 1974. The first trial ended in a hung jury and a mistrial. The case was then retried, on September 9, 10, and 11, 1974, with the jury finding appellant guilty on both counts.

the robbers escaped, a latent fingerprint was lifted by the FBI from the teller's cash drawer on the day of the robbery.*

On May 25, 1972, the FBI identified the latent print from the teller's cash drawer as that of appellant.

(1) The Speedy Trial Issue

On August 17, 1972, a Federal complaint was filed in the Southern District of New York, charging appellant with the bank robbery. The complaint cited the identification of the latent fingerprint from the cash drawer, eyewitness testimony and identification of appellant in the bank surveillance photographs. On the same day as the filing of the complaint, Magistrate Goettel issued a warrant for appellant's arrest in connection with this case.**

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*/ The bank was robbed by three men, all of whom were photographed inside the bank. A woman accomplice allegedly waited outside in a car.

**/ The government's theory was that appellant robbed the bank with Woody Green, Twymon Myers amd Gwendolyn Ferguson.

Woody Green was killed by New York City police detectives in Brooklyn on January 22, 1973.

On July 25, 1973, a complaint was filed in the Souhtern District of New York, charging Twymon Myers and Gwendolyn Ferguson with the instant bank robbery.

Twymon Myers was killed by New York City police and FBI agents in the Bronx in November, 1973.

Gwendolyn Ferguson was a fugitive when the instant indictment was filed and has continued to remain a fugitive.

Appellant was "absent" [as defined in Rule 5(d) of the Court's Rules Regarding Prompt Disposition of Criminal Cases] until September 17, 1973, when he was arrested by New York City Police officers in the Bronx. His presence was immediately made known to the government: On the very day of his arrest, he was interviewed by FBI Agent Robert McCartin, the agent in charge of the instant case. On the following day, September 18, 1973, the United States Marshal for the Southern District of New York was notified that appellant was being held in the Bronx House of Detention.

On March 12, 1974, the instant indictment was filed, naming appellant and Gwendolyn Ferguson as defendants, and charging both with bank robbery and armed bank robbery.

On April 1, 1974. appellant was arraigned on the instant case. The Court found that at no time between September 17, 1973, and April 1, 1974, was appellant ever on "trial of other charges"[Rule 5(a), Prompt Disposition Rules, supra] (M.18)*.

At the April 1, 1974, arraignment, appellant's counsel noted that more than six months had already lapsed since appellant's September 17, 1973, arrest, and that the government had not yet filed a notice of readiness for trial. On April 10, 1974, appellant filed a formal

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*/ "M" refers to minutes of argument of pre-trial motions, May 17, 1974.

motion to dismiss based on the government's failure to comply with the Court's Prompt Disposition Rules, citing the failure of the government to bring appellant to trial or to even file a notice of readiness during the six-and-a-half-month period between September 17, 1973, and April 1, 1974.

The Court [Bauman, J.]* found that appellant's presence in the Bronx House of Detention "was known to federal authorities" since September 18, 1973 (M.17), and ruled that since appellant "ha[d] been in the custody of New York authorities and ha[d] not been in the custody of the federal authorities" during that period, "[a]ccordingly it is my view that the six month rule has not started to run... . The motion is denied" (M.18).

Appellant renewed his speedy trial motion prior to the re-trial herein (T-II. 14-32).** The motion was again denied, this time by Judge Motley, but for a different reason than that given by Judge Bauman: Judge Bauman had ruled that the September 17, 1973, through April 1, 1974, period was excludable because appellant had been in state rather than federal custody; Judge Motley ruled that the same September 17, 1973,

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*/ The instant case was assigned to Judge Bauman until approximately June 6, 1974, when it was reassigned to Judge Motley.

**/ "T-II" refers to the minutes of appellant's re-trial, September 9, 10, and 11, 1974.

through April 1, 1974 period, or at least some part of that period, was tolled under Rule 5(a) of the Court's Prompt Disposition Rules because of presumed pre-trial proceedings not related to the instant case, but rather to state-court charges pending against appellant during that period (T-II,32).* There is nothing in the record to support this assumption, and appellant maintained and continues to maintain that he had no pre-trial hearings on any state-court charges during that period, and that Rule 5(a), insofar as it tolls the speedy trial rules during the pendency of proceedings on "other charges," only does so for "trial of other charges" (T-II,27).**

(2) The 'Feinberg Promise'

On November 15, 1973, Indictment 73 Cr. 1039 (S.D.N.Y.) was filed, charging appellant, together with co-defendants Phyllis Pollard*** and Joe Lee Jones, Jr,****

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*/ Appellant was never on trial during the September, 1973-April, 1974 period. He was on trial in the Bronx on a state-court charge in May, 1974.

**/ Appellant also renewed his speedy trial motion in his post-trial motions to vacate the judgment herein.

***/ Pollard pleaded guilty, on May 20, 1974, to bank larceny (the 10-year count), and was later sentenced to probation, as a young adult offender.

****/ Jones pleaded guilty, on May 15, 1974, to bank larceny, and was later sentenced to probation, as a young adult offender.

and with Twymon Myers* and Avon White**, with conspiracy and substantive bank robbery counts, in connection with the July 18, 1973, robbery of the Bruckner Boulevard, Bronx, branch of the First National City Bank.

As of June 6, 1974, appellant's speedy trial motion directed at the instant indictment had been denied, and both the instant indictment and Indictment 73 Cr. 1039 had been assigned to Judge Motley. At a pre-trial conference, on June 6, 1974, Judge Motley indicated that she intended to try Indictment 73 Cr. 1039 first, because Joe Lee Jones, who was to testify for the government in that case, had already been in jail for seven months and was then being held as a material witness (F.2).***

Assistant United States Attorney Feinberg requested the Court to reverse the planned order and to try the newer, instant indictment before 73 Cr. 1039. Mr. Feinberg assured the Court that:

> The Government expects that in the event Mr. Kearney is convicted of the [instant] bank robbery we will not prosecute the second case. There will only be one bank robbery tried.
>
> (F.3)

---

*/ Myers had been killed by the police by the time the indictment was filed.

**/ White had made a deal with the government, which included his not being indicted in this First National City bank robbery.

***/ "F" refers to minutes of pre-trial conference, June 6, 1974.

Appellant's counsel argued that 73 Cr. 1039 should be tried first, as originally scheduled (F.6). Mr. Feinberg argued that there were "many evidentiary problems" with 73 Cr. 1039, and again stated that:

> ... if there is a conviction that will end both of these. We don't contemplate trying the second case.
>
> (F.10)

The Court termed this argument "a very persuasive reason ... . because if the Government will drop the second indictment that will certainly save another trial" (F.10). The Court accepted the government's argument that since its proof was stronger on the instant case, it should be allowed to try its stronger case first.

The instant indictment was thus tried on June 17, 18, 19 and 20, 1974, ending in a hung jury and a mistrial. Immediately after declaring the mistrial, the Court, without asking counsel for their preference, announced that:

> What we will do is to try the next case [73 Cr. 1039] Monday ... and then we will get back to the retrial of this case... after that.
>
> (T-I. 397)*

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*/ "T-I" refers to minutes of appellant's first trial herein, June 17, 18, 19 and 20, 1974.

Mr. Feinberg then reminded the Court that a retrial of the instant case would not be necessary if 73 Cr. 1039 "results in any sort of conviction" (T-I. 398, emphasis added).

The trial of 73 Cr. 1039 was thus held on June 24, 25 and 26, 1974 and it resulted in the conviction of appellant on the conspiracy count and his acquittal on all three substantive counts. Nevertheless, the government insisted on retrying the instant case. Prior to that retrial, appellant argued that the 'Feinberg Promise' should estop the government from such a retrial (T-II. 4-14).

The Court overruled appellant's arguments, ruling not that the 'Feinberg Promise' could not have legal effect, but rather that the 'Feinberg Promise' must be interpreted as not having been meant to cover the situation as it existed after appellant was convicted on the conspiracy count of 73 Cr. 1039:

> THE COURT: It seems clear to me that the government had in mind a conviction on the indictment, or one of these indictments rather than or as opposed to conviction on one of these counts ... . What do you think [Feinberg] meant by 'conviction'? Do you think he really meant if he was convicted on one count like the conspiracy count?
>
> (T-II.10)

* * *

> My ruling is the government clearly intended that if he were convicted in that first case, or even in [73 Cr. 1039] on the indictment, they wouldn't proceed to try him again... .
>
> (T-II. 13, emphasis added)*

(3) The Tainted Fingerprint Comparison

Appellant moved, prior to trial, for suppression of all fingerprint evidence, arguing that all such evidence was derived from, tainted by, and done solely to corroborate the illegal initial fingerprint comparison.

Appellant was arrested by New York City police officers in Brooklyn on April 17, 1972, on unrelated state charges. On May 25, 1972, the F.B.I. identified appellant as one of the bank robbers in the instant case, based upon a comparison of the latent fingerprint from the teller's cash drawer with appellant's fingerprints taken in conjunction with his April 17, 1972, Brooklyn arrest.

Appellant claimed below that the Brooklyn fingerprints were illegally obtained (T-I. 10-18, 76-84; also, Appellant's Trial Memorandum, pp. 8-10).

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*/ Appellant brought this question to the attention of the panel of this Court in 74-2238 (the appeal of his conviction on 73 Cr. 1039) and, he requested that the entire 'Feinberg Promise' question be referred to the panel that hears the instant appeal.

The government opposed any hearing as to the legality of the Brooklyn fingerprints (T-I.17), and the Court assumed that the Brooklyn prints were illegally obtained (T-I. 13).

The government agreed not to use the Brooklyn prints at the trial below, and relied instead on a set of appellant's fingerprints, taken on September 17, 1973. On that date, appellant was arrested by New York City police officers in the Bronx on another unrelated state charge. F.B.I. Agent McCartin, the case agent on the instant bank robbery,went to the Bronx on September 17, 1973, and fingerprinted appellant. These prints were not made incident to appellant's arrest on the Bronx state charges, but rather were made on an F.B.I. fingerprint card which stated that they were being made in conjunction with the instant bank robbery (T-I.77).

Appellant argued that the government should not be allowed to use these 'McCartin' prints, since they were made merely to corroborate what the government had learned from the illegal Brooklyn prints and were thus tainted, The government argued that the 'McCartin' prints were not tainted by the knowledge derived from the illegal Brooklyn prints. The Court ruled for the government.

(4) The Destruction of the Fingerprint Lifts

At the trial, the fingerprints were crucial evidence against appellant. Appellant sought to weaken the inference to be drawn from the presence of his prints in the bank by attemtpting to show that there were many other persons' fingerprints left in the bank on the morning of the robbery. If appellant could have shown that his prints were not the only ones present at that time, the inference of guilt would not have pointed exclusively toward appellant.

Former F.B.I. Agent John Ford testified that he was experienced in lifting fingerprints and that he lifted 8 prints from the bank shortly after the robbery.

William Carman, a fingerprint analyst employed by the F.B.I., testified that he destroyed 4 of those 8 lifts and that he preserved no record at all of those 4 lifts.

Appellant's counsel, in cross-examining Carman, was attemtping to establish that those 4 destroyed lifts might have belonged to someone other than appellant, but the Court cut off any further cross-examination on that subject, ruling that since the government was not claiming that the 4 missing prints were those of appellant, the 4 lifts were irrelevant (T-II. 174). The Court similarly limited appellant's

summation on this subject (T-II. 247-249).

(5) The Government's Summation

The Assistant United States Attorney, in his summation, over defense objection, repeatedly stressed the fact that the defense had not called any fingerprint expert to contradict the testimony of the government's two experts:

> Ladies and gentlemen, during this trial the testimony of those two fingerprint experts went uncontradicted. ... in this case, where is the contradiction? Where is the expert who undercuts or refutes the testimony of these two experts who have given positive opinions?
>
> (T-II. 283)

> Wouldn't you think that in the face of the government's two experts there was need for an expert if one exists to contradict or question the identification of those two prints?
>
> (T-II. 284, emphasis added)

> I would submit there wasn't an expert called for a very good reason. .... As a substitute for this expert testimony, Mr. Berman spent minutes up there showing you ridges and loops which in his opinion were not the same.
>
> (T-II. 285)

> It's all very good for Mr. Berman to get up there and give us a lecture on fingerprints, but I ask you again, where is that expert of Mr. Berman? .... Where was the fingerprint expert to say that those prints don't belong to Mr. Kearney?
>
> (T-II. 286)

> ... where is the expert with 23 years experience or one year's experience to testify? There isn't and I submit there can't be in this case.
>
> (T-II. 286-287)
>
> Neither of course, did Mr. Berman call his own expert to at least ask him about the dissimilarities he has been talking to you about, and I think you can conclude that the reason for that is that there isn't one in the City of New York who would cast doubt on the identification of the fingerprint in the cash drawer as that of Mr. Kearney.
>
> (T-II. 288-289)

The Court permitted the prosecutor to make all of these comments. In addition, the prosecutor made one comment that clearly referred to missing testimony which could have been given only by appellant:

> ...I ask you again, where is the testimony, where is the welfare check that shows what bank it's cashed at.
>
> (T-II. 287, emphasis added)

Finally, the prosecutor in effect testified, over objection, by giving the impression that he knew of a "fact" which had not been presented to the jury:

> The fact is, there is no welfare check which explains Mr. Kearney's presence in the bank... .
>
> (T-II. 289, emphasis added)

The Court also denied appellant's motion to vacate the judgment because of the above comments.

Appellant was found guilty as charged.

(6) The Sentence

On September 16, 1974, appellant appeared before the Court for sentencing on the instant case and on his conspiracy conviction under 73 Cr. 1039.

Appellant pointed out several glaring errors in the pre- sentence report. At page two, the report stated that in the 73 Cr. 1039 case, appellant had stolen $5,538 from the bank on July 18, 1973, the very charge of bank larceny of which he had been found not guilty on Count 2 of that indictment(S.341)*.

The pre-sentence report also stated that appellant had been found guilty of the charges in 73 Cr. 1039 (id.).

Under appellant's prior record, it listed one case that was in fact still open and had not yet gone to trial, as well as a Bronx attempted murder charge, of which appellant had, in fact, been found not guilty (S.342).

At page six of the pre-sentence report, it is alleged that appellant:

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*/ "S" refers to the minutes of sentence, September 16, 1974, which are paginated 340 through 355.

> became a member of the Black Panther Party, a radical political group.
>
> (S.344)

Refernce was also made to the Black Liberation Army.

Appellant, at the time of sentence, was 22 years old and had only one prior misdemeanor conviction. He was eligible for Young Adult Offender treatment. Counsel asked the Court not to sentence appellant for having gone to trial or for those counts of which he was acquitted (S.347-9). Counsel specifically argued that Young Adult Offender status should not be reserved solely for those who plead guilty (S.348).

The Court stated that it would sentence appellant solely on the basis of evidence at trial:

> It's on the basis of that evidence alone which the Court sentences the defendant at this time.
>
> (S.351)
>
> In [73 Cr. 1039] the evidence dislcosed that Mr. Kearney himself fired a firearm.
>
> (S.352)

Appellant had, of course, been acquitted of such a charge in Count 4 of that indictment.

The Court, immediately after the above remark about the firearm, denied appellant Young Adult Offender

treatment (S.352), and sentenced him to five years imprisonment, the maximum penalty allowable, on 73 Cr. 1039, and to ten years imprisonment under the instant indictment (S.353).

Immediately after imposing sentence, the Court asked if there were "a motion with respect to the open counts in indictment 73 Cr. 1039" (S.353). Counsel informed the Court that there were no open counts in that indictment, and the Court then remembered:"I am sorry, he was acquitted." But the Court let the sentence stand.

ARGUMENT

POINT I

THE COURT ERRED (1) IN RULING THAT THE SIX-MONTH SPEEDY TRIAL RULE WAS TOLLED FOR THE PERIOD THAT APPELLANT WAS IN STATE CUSTODY, AND (2) IN ASSUMING, WITHOUT AN EVIDENTIARY HEARING, THAT THERE HAD BEEN STATE-COURT PROCEEDINGS INVOLVING APPELLANT DURING THAT PERIOD, AND (3) IN RULING THAT THE SIX-MONTH RULE IS TOLLED FOR PROCEEDINGS, OTHER THAN TRIAL, ON OTHER CHARGES.*

Appellant sought dismissal of the indictment herein based on the failure of the government to file

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*/ The facts relating to the speedy trial issue are set forth in detail at pp. 3-6, supra.

a notice of readiness or to bring him to trial during the six-and-one-half month period between September 17, 1973, and April 1, 1974.*

There is no doubt that if the government does not file a notice of readiness within the six-month period and does not want the indictment dismissed, it becomes

> ... incumbent upon the Government to demonstrate that one of the tolling periods provided in Rule 5 of the Plan is applicable.
>
> United States v. Flores, 501 F.2d 1356, 1359 (2d Cir. 1974)

When appellant's motion to dismiss was originally made, Judge Bauman denied it, ruling that since appellant "ha[d] been in the custody of the New York authorities and ha[d] not been in the custody of federal authorities" during that period, "[a]ccordingly it is my view that the six-month rule has not started to run" (M.18)**

This ruling was erroneous. There is simply no such automatic exception under Rule 5 of the Plan for time spent in a city jail, within the district, while under

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*/ The complaint herein against appellant was filed on August 17, 1972, but appellant has always agreed that the six-month rule was tolled until September 17, 1973.

**/ Appellant had been in the Bronx House of Detention from September 17, 1973, through April 1, 1974, with a federal detainer lodged against him for the instant case. Judge Bauman found that appellant's presence there "was known to federal authorities"since September 18, 1973 (M.17).

a federal detainer for the federal charge at issue: Appellant was not "absent," as defined in Rule 5(a), since his location was known. Nor was he "unavailable," as defined in that rule, since there was no proof that "his presence for trial [could] not be obtained by due diligence" [Rule 5(a)], and

> the burden of proof is on the Government to establish those times to be excluded from the six-month period... .
>
> United States v. Flores, supra, 501 F.2d at 1360.

Indeed, Rule 5(f) specifically tolls the six-month rule only for

> [t]he period of delay resulting from the detention of the defendant in another jurisdiction provided the prosecuting attorney has been diligent and has made reasonable efforts to obtain the presence of the defendant for trial.
>
> (emphasis added)

Thus, there can be no tolling of the six-month rule for the time appellant spent in the Bronx House of Detention, since he was within the Southern District of New York, the federal detainer for this case had been lodged, his presence there was known to the federal authorities, and no diligent effort was ever made to bring him to court for this case until April 1, 1974. Judge Bauman's 'state-custody' rationale is simply one for which no authority can be found in the Rules.

When the motion was renewed before Judge Motley,

it was again denied, but on a different theory: that the September 17, 1973 - April 1, 1974, period was excludable under Rule 5(a). Judge Motley assumed that appellant had been involved in pre-trial state-court proceedings during that period, and ruled that such proceedings would be covered by Rule 5(a).

Here the Court erred in two ways. It was error to assume the existence of such pre-trial state-court proceedings during that period, for, as noted earlier,

> the burden of proof is on the Government to establish those times to be excluded from the six-month period ... .
>
> Flores, supra, at 1360.

Appellant conclusively established that six-and-one-half months had elapsed* and that the government had never filed a notice of readiness. Once appellant had established these two facts, he was entitled to a dismissal of the indictment, unless the government could

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*/ [T]here is no de minimis time period under the six months' rule; the Government 'must be ready for trial within six months ...,' not six months and three days, four days, five days or nine days. This has to be the case since we are dealing with a clear line of time - much like a statute of limitations - marked for prophylactic puposes, not to be analogized to the equitable doctrine of laches. There are any number of '[e]xcluded periods' under Rule 5 of the Plan on which the Government may base a claim to toll the period, but the period itself is fixed, clearly, sharply and without qualification, at six months.

United States v. McDonough, 504 F.2d 67, 68-69 (2d Cir. 1974)

meet its burden of proving one of the exceptions under Rule 5. In the instant case, the government never offered any evidence of the existence of any pre-trial state-court proceedings involving appellant during the September 1973-April 1974 period. The Court was without power to merely assume the existence of such proceedings. This Court has consistently required that the government attempt to meet its burden of proof at

> ...an evidentiary hearing on whether any period of time was 'excludable' under Rule 5 of the Plan.
>
> United States v. McDonough, 504 F.2d 67, 68 (2d Cir. 1974), emphasis added.

Finally, even if the government had been able to establish the existence of pre-trial state-court proceedings involving appellant during the September 1973-April 1974 period, such proceedings are not, as the Court erroneously held (T-II. 32), covered by Rule 5(a) of the Plan.

Rule 5 (a) tolls the six-month rule during the pendency of proceedings such as competency determinations, "pre-trial motions, interlocutory appeals, trial of other charges, and the period during which such matters are sub judice." Applying the appropriate maxim of statutory interpretation, it is evident that in the

clause relating to "other charges," only "trial" of such other charges is explicitly included, indicating the implicit exclusion of pre-trial proceedings in "other charges."* This interpretation is in no way prevents a ccurt from excluding those pre-trial proceedings in other charges when the government proves that such proceeding actually rendered the defendant "unavailable," despite the government's "due diligence," under Rule 5(d). But there was no such proof by the government in the instant case, and Judge Motley's ruling was under an erroneous interpretation of Rule 5(a) and was based on an assumption of facts, rather than on proof of such facts.

The judgment must be reversed and the indictment dismissed.

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*/ Similarly, the inclusion of the words "other charges" in that clause indicates that the examples listed in the other clauses of Rule 5(a) all refer to the federal charge at issue.

POINT II

THE GOVERNMENT, HAVING PERSUADED THE COURT TO REVERSE THE SEQUENCE IN WHICH THE COURT HAD PLANNED TO TRY APPELLANT"S TWO CASES, BY PROMISING THAT IT WOULD BE SATISFIED WITH ONE CONVICTION OF 'ANY SORT,' IS ESTOPPED FROM MAINTAINING THE CONVICTION AGAINST APPELLANT ON THE INSTANT CASE.*

On June 6, 1974, both of appellant's cases were before Judge Motley for a pre-trial conference.** Both the Court and appellant intended to try 73 Cr. 1039, the older of the two indictments, first, as previously scheduled (F.2). The government wanted to try the newer, instant case first.

Assistant United States Attorney Feinberg succeeded in persuading the Court to reverse the sequence in which the Court had planned to try appellant's two cases, by promising that the government would be satisfied with one conviction of "any sort" against appellant:

> [I]f there is a conviction, that will end both of these.
>
> (F. 10)

The Court approved of this offer:

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*/ The facts relating to the government's promise are set forth in detail at pp. 2-3 and 6-10, supra.

**/ Indictment 73 Cr. 1039 had always been assigned to Judge Motley. The instant case had been assigned to Judge Bauman until shortly after he announced his retirement from the federal bench.

... because if the Government will drop the second indictment that will certainly save another trial.

(id.).

And Mr. Feinberg later cleared up any possible doubt as to what he meant by "a conviction," when he stated that a retrial of the instant indictment would not be necessary if 73 Cr. 1039

results in any sort of conviction.

(T-I. 398, emphasis added)

After 73 Cr. 1039 resulted in the conviction of appellant, but on less than the entire indictment, the instant case re-assigned to Assistant United States Attorney Glekel, who insisted on retrying it. Appellant reminded the Court of the 'Feinberg Promise'. The Court, which did have before it the verbatim transcript of Mr. Feinberg's remarks at T-I. 398, supra, and which no longer had the benefit of Mr. Feinberg's presence, erroneously assumed that Mr. Feinberg had meant that the quid pro quo was a conviction on an entire indictment (T-II. 10). The record, however, clearly reflects Mr. Feinberg's using the phrase "any sort of conviction," and the Court, therefore, should have enforced the government's promise and dismissed the instant indictment. See Santobello v. New York, 404 U.S. 257 (1971); Giglio v. United States, 405 U.S. 150, at 154 (1972).

Appellant has requested the panel of this Court

which heard his appeal from 73 Cr. 1039 to refer this estoppel question to this panel, which should enforce the government's promise and estop it from maintaining this, second conviction against appellant. The judgment herein should be reversed and the indictment dismissed.

POINT III

SINCE THE 'McCARTIN PRINTS WERE TAKEN MERELY TO CORROBORATE WHAT THE GOVERNMENT HAD LEARNED FROM THE ILLEGAL BROOKLYN PRINTS, THE 'McCARTIN' PRINTS WERE TAINTED AND HAD NO INDEPENDENT SOURCE, AND ALL THE FINGERPRINT EVIDENCE SHOULD HAVE BEEN SUPPRESSED.*

Appellant was identified as one of the bank robbers through a comparison made with the illegally obtained Brooklyn set of his prints.**

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*/ The facts relating to the suppression of the fingerprint evidence are set forth in detail at pp. 10-11, supra.

**/ The theory of the illegality of the Brooklyn set of prints was set out in appellant's Trial Memorandum. The government opposed any evidentiary hearing on the taking of the Brooklyn prints, and the Court properly assumed that they had been illegally obtained (T-I. 13). See also, Government's Post-Trial Memorandum of Law, which notes, at p.7, that"the Government had been willing to assume the illegality of this [Brooklyn] fingerprinting in order to expedite matters ... .".

Although the government agreed not to use those Brooklyn prints at the trial below, the 'McCartin' prints, which were used by the government at the trial, were tainted by the Brooklyn prints and had no independent source of their own. This is because the 'McCartin' prints were not taken innocently and independently, because of some unrelated arrest of appellant. Rather, they were specifically taken (1) by F.B.I. Agent Robert McCartin, who was already the case agent on the instant case, (2) on an F.B.I. fingerprint card which listed this particular bank robbery as the crime involved, and, most significantly, (3) the idea to have McCartin go to the Bronx and take another set of appellant's prints was suggested by and thus tainted by the earlier, positive comparison with the illegal Brooklyn set of appellant's prints.

Once it is realized that the 'McCartin' prints came into existence not through the normal course of police business, but, instead, through a purposeful attempt to corroborate what had been learned from the Brooklyn prints, it cannot be claimed that the 'McCartin' prints had their own independent source. Thus, all of the fingerprint evidence offered at the trial below must be suppressed as the "fruit of the poisoned tree," since Agent McCartin would never have made the corroborative comparison but for the fact that he had already learned, from the illegally obtained Brooklyn prints, that the

latent bank robbery prints were apparently those of appellant.

Since the 'McCartin' prints were taken simply to confirm what the government had previously learned illegally, the fingerprint comparison evidence offered at trial, which was based on those prints must be suppressed and the indictment dismissed. Wong Sun v. United States, 371 U.S. 471(1963); United States v. Paroutian, 299 F.2d 486, 489 (2d Cir. 1962).* To hold otherwise would be to give the government, on the proverbial "silver platter," use of the fruits of the knowledge it had obtained from the primary illegality.

POINT IV

THE FACT THAT THE GOVERNMENT WAS NOT CLAIMING THAT THE 4 PRINT LIFTS WHICH IT DESTROYED BELONGED TO APPELLANT DID NOT RENDER THESE PRINTS OR THEIR DESTRUCTION IRRELEVANT, AND THE COURT ERRED IN LIMITING CROSS-EXAMINATION AND SUMMATION ON THAT ISSUE.**

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*/ If the government had shown that it had some non-fingerprint source pointing to appellant, before it learned of him through the illegal Brooklyn prints, the judgment might be sustained. But here, the government focused upon appellant solely because of the Brooklyn fingerprint comparison , and then proceeded to build their case against him. The 'McCartin' prints were thus an exploitation of the primary illegality, and not an independent source. United States v. Paroutian, supra, 299 F.2d at 489.

**/ The facts relating to the destruction of the 4 fingerprint lifts are set forth in detail at pp.12-13, supra.

Although Agent Ford lifted 8 prints from the bank, Mr. Carman, who also worked for the F.B.I., destroyed 4 of those lifts, without showing them to anyone and without keeping any record of what they showed.

Appellant, through cross-examination, was attempting to establish that the 4 destroyed lifts might have belonged to someone other than appellant, thus diminishing the signifigance of the presence of appellant's prints among the other 4 lifts. The Court, however, ruled that the 4 destroyed lifts were irrelevant, and curtailed cross-examination and summation on this point (T-II. 174, 247-249). This was error.

> 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence
>
> Federal Rules of Evidence (Public Law 93-595), Rule 401, emphasis added.*/

There is no question but that the presence of other persons' prints in the bank at the time of the robbery would have a tendency to make less probable

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*/ Although these rules are not yet in effect, Rule 401, supra, is a concise statement of the existing legal concept of relevancy.

the identity of appellant as the bank robber.*Certainly appellant's guilt becomes less definite if his prints are not the only person's prints found in the bank. Equally probative would be the conscious destruction of evidence by a government agent.

The jury should have been permitted to hear Carman's full account of why he could not or would not preserve those 4 lifts until a defense expert, a court or a jury could see them. And appellant should have been allowed to argue to the jury the inferences it might have drawn from Carman's conduct.

The judgment should be reversed and a new trial ordered.

POINT V

THE PROSECUTOR, IN HIS SUMMATION, IN EFFECT COMMENTED ON APPELLANT'S NOT TESTIFYING, GAVE THE IMPRESSION THAT HE KNEW FACTS OUTSIDE THE RECORD, AND, IN TOTALITY, SHIFTED TO APPELLANT PART OF THE GOVERNMENT'S BURDEN OF PROOF.**

Appellant argued that his prints might have innocently been on the teller's counter, even if he had no account at the bank. For example, if he had come

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*/ Nor was the government's statement that it was not claiming that the destroyed lifts were appellant's dispositive, for

> The fact to which the evidence is directed need not be in dispute.
>
> Advisory Committee Note to Rule 401, supra.

**/ The facts relating to the prosecutor's summation are set forth in detail at pp 13-15, supra.

in to get change of a $10 bill or to cash a small welfare check, his prints might have been left on the counter and the bank would have no record of the transaction. Thus, appellant would be the only real witness who could testify to such a transaction.

The prosecutor, in his summation, in effect commented on appellant's not testifying on this point:

> ... I ask you again, where is the testimony, where is the welfare check that shows what bank it's cashed at.
>
> (T-II. 287, emphasis added)

Comment on a defendant's failure to take the stand requires reversal of the conviction. Griffin v. California, 380 U.S. 609(1964), and

> remarks concerning lack of contradiction are forbidden... where the defendant alone could possibly contradict the government's theory... .
>
> United States ex rel. Leak v. Follette, 418 F.2d 1266, 1269(2d Cir. 1969)

In the instant case, the prosecutor's reference, supra, to "where is the testimony" necessarily referred to appellant's failure to testify and calls for a new trial herein.

To compound his misconduct, the prosecutor then gave the jury the impression that he knew and could testify to facts outside the record:

> The fact is, there is no welfare check which explains Mr. Kearney's presence in the bank ... .
>
> (T-II. 289, emphasis added)

This, too, was, of course, improper:

> ... it was a statement of belief that the jury was expected to understand came from the prosecutor's personal knowledge... and as such he was speaking ... based on matter outside the record.
>
> United States v. Grunberger, 431 F.2d 1062, 1068 (2d Cir. 1970)*

Finally, the virtual avalanche of prosecutor's comments (at pp. 14-15, supra) on the failure of the defense to call a fingerprint expert, shifted to appellant part of the prosecution's burden of proof. The very number of such comments, as well as their intensity and their timing within the prosecutor's summation, could not be cured by the Court's attempts at mitigating instructions. By shifting part of its burden of proof, the government denied appellant due process of law. In Re Winship, 397 U.S. 359(1970); Speiser v. Randall, 357 U.S. 513(1958).

> [T]he prosecution must convince the trier of all the essential elements of of guilt.
>
> In Re Winship, supra, 397 U.S. at 361.

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*/ See generally, United States v. Gonzalez, 488 F.2d 833, 836(2d Cir. 1973); United States v. Drummond, 481 F.2d 62, 64 (2d Cir. 1973).

> Due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the factfinder of his guilt.
>
> Speiser v. Randall, supra, 357 U.S. at 526.

The prosecutor's summation in the instant case effectively caused the appellant to bear part of the burden of producing the evidence, Speiser, supra, thereby denying appellant due process. The judgment must be vacated and a new trial ordered.

POINT VI

THE COURT, IN SENTENCING APPELLANT AND IN DENYING HIM YOUNG ADULT OFFENDER STATUS, ERRONEOUSLY RELIED ON THE EXISTENCE OF FACTS AND CHARGES OF WHICH APPELLANT HAD BEEN ACQUITTED.*

After appellant pointed out that the pre-sentence report had referred to appellant as having been convicted of crimes for which he had been acquitted, the Court said it would sentence appellant solely on the basis of the evidence at trial (S. 351). The Court then cited the testimony that appellant had fired a firearm during the 73 Cr. 1039 bank robbery (S. 352) and, immediately after noting this "fact," the Court denied appellant Young Adult Offender treatment and sentenced him to ten years imprisonment (S.353).

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*/ The facts relating to appellant's sentence are set forth in detail at pp. 15-17, supra.

This was error because appellant was acquitted in 73 Cr. 1039 of all the substantive counts, including, specifically, armed bank robbery (Count 4).*

A sentence cannot be based on facts which are incorrect or inadmissible, or upon charges for which a defendant has not been convicted. United States v. Tucker, 404 U.S. 433(1972); Townsend v. Burke, 334 U.S. 736, 740-741(1948); United States v. Malcolm, 432 F.2d 809, 816(2d Cir. 1970); Verdugo v. United States, 402 F.2d 599(9th Cir. 1968).

> Misinformation or misunderstanding that is materially untrue regarding a prior criminal record, or material false assumptions as to any facts relevant to sentencing, renders the entire sentencing procedure invalid as a violation of due process.
>
> Malcolm, supra, 432 F.2d at 816.

Appellant , who, on 73 Cr. 1039, was acquitted o of firing a gun and acquitted of bank robbery, remains forever clothed in the presumption of innocence as to those charges, and to have his sentence, even in part, based upon those charges violated due process.

The judgment must be reversed and the matter remanded for resentencing.

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*/ The Court also referred to "open counts," of which there were none (S.353).

CONCLUSION

THE JUDGMENT SHOULD BE REVERSED AND THE INDICTMENT DISMISSED. IN THE ALTERNATIVE, A NEW TRIAL SHOULD BE ORDERED. IN THE ALTERNATIVE, THE MATTER SHOULD BE REMANDED FOR RESENTENCING.

Respectfully submitted,

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Counsel for appellant wishes to thank Steven Bernstein, law clerk, for his indispensable assistance in the preparation of this brief.